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In The

Supreme Court of the United States

OCTOBER TERM, 1956

No. 240

H. T. ARNOLD,

Petitioner,

vs.

PANHANDLE AND SANTA FE RAILWAY COMPANY,

Respondent.

RESPONDENT'S MOTION FOR REHEARING

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RESPONDENT'S MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent respectfully moves for a rehearing in this case.

I.

Prior to the trial of this case in November, 1954, this Court had fully expounded the Federal Employers' Liability Act and had announced a consistent line of principles and shown how they were to be applied to specific facts, for guidance of the lower courts, as evidenced by the following:

Tiller vs. Atlantic Coast Lines, 318 U. S. 54 (1943):

Mr. Justice Black, writing for the Court:

"In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done".

Mr. Justice Frankfurter concurring:

"But the 1939 Amendment left intact the foundation of the carrier's liability — negligence."

Brady vs. Southern R. Co., 320 U. S. 476, (1943):

Mr. Justic Reed speaking for the Court:

"Liability arises from negligence, not from injury under this Act. And the negligence must be the cause of the injury . . . The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of facts — in this case, the jury".

Mr. Justice Black, writing in dissent:

"Surely this rail was the 'proximate cause' if those words be used to mean an event which contributes to produce a result, which is the meaning Congress intended . . ."

Tennant vs. Peoria & P. U. R. Co., 321 U. S. 29, 88 L.Ed. 520 (1944):

Mr. Justice Murphy, speaking for the Court:

"Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred . . . The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. Galloway v. United States, 319 U. S. 372, 395, 87 L. Ed. 1458, 1473, 63 S. Ct. 1077; Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351, 74 L. Ed. 896, 50 S. Ct. 281."

Ellis vs. Union P. R. Co., 329 U. S. 649 (1947):

Mr. Justice Douglass, speaking for a unanimous Court:

"The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury."

Wilkerson vs. McCarthy, 336 U. S. 53 (1949):

Mr. Justice Black, speaking for the Court:

" . . . the Act imposes liability only for negligent injuries".

Mr. Justice Douglass concurring:

" . . . the Act did not make the employer an insurer

The liability which it imposed was the liability for negligence." . . .

"The basis of liability under the Act is and remains negligence. Judges will not always agree as to what facts are necessary to establish negiligence."

Urie vs. Thompson, 337 U. S. 163 (1949):

Mr. Justice Rutledge, speaking for the Court:

"We recognize, with Respondent, that the Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms."

Moore vs. C. & O. Ry, Co., 340 U. S. 573 (1953):

Mr. Justice Minton, speaking for the Court:

"To recover under the Act, it was incumbent upon petitioner to prove negligence of Respondent which caused the fatal accident."

Stone vs. N. Y. C. L. & St. L. R. Co., 344 U. S. 407 (1953):

Mr. Justice Douglass speaking for the Court:

"The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. Wilkerson v. McCarthy, 336 U. S. 53, 61, 93 L. Ed. 497, 504, 69 S. Ct. 413."

Mr. Justice Frankfurter, speaking in dissent:

"However, the central components of liability for negligence – that it rests upon fault and that appropriate casuality must be established between the negligent circumstances and the complained-of-injury – are the same for actions under the Federal Employers' Act as for any other negligence actions."

In the trial and appellate review of this case, the above stated principles, clearly enunciated by this Court on negligence and proximate causation, were certainly not departed from in any respect, and if there has been departure from those principles in *Schulz vs. Penn. R. Co.*, 350 U. S. 523 (1956) and *Rogers vs. Missouri-Pacific R. Co.*, 352 U. S. 500 (1957), the departure is in strictly "no evidence" cases, whereas this is a "construction of verdict" case, and such departure, if any, having occurred subsequent to the trial and appellate review of this case in Texas, and not changing any principles regarding "jury verdict construction cases", should not warrant the reversal of the judgment of the Court of Civil Appeals.

In granting writs in Federal Employers' Liability Act cases, to review "sufficiency of evidence," this Court has heretofore asserted such laudable purpose as the need to give proper guidance to lower courts, and to bring about uniformity in the construction and application of the Act. As is evidenced by the opinions in *Tiller*, *Brady*, *Tennant*, *Wilkerson*, all supra, and numerous other cases, this Court, in addition to announcing the governing principles, has meticulously recited the facts and circumstances upon which it reasoned that the jury could infer both negligence and proximate causation. Such recitation of the facts and this Court's expressed reasoning on proximate cause did give some guidance to the lower courts to make application of the principles theretofore expounded by this Court.

But in this particular case, Respondent cannot find in the majority opinion any recitation of facts which shows possible causation, or any expressed reasoning process which discloses what error was committed by the Court of Civil Appeals, or which gives any guidance to the lower courts in subsequent cases, and Respondent believes this should be done in aid of the proper administration of the Act.

II.

The Court of Civil Appeals was confronted with the inescapable duty of construing the jury verdict. It construed the jury verdict as a whole, in the light of the pleadings, the evidence, and the way and manner in which the case had been submitted, and in the language of Mr. Justice Holes, in *Pardee vs. Aldridge*, 189 U. S. 429, it gave effect to the specific findings "which expressed the free judgment of the jury".

Respondent respectfully suggests that the opinion of this Court does not construe the jury verdict as a whole, in the light of the pleadings and the evidence, nor does it take into consideration the manner in which the issues were submitted, or the fact that Petitioner's own counsel drafted the issues and guided the manner of submission. As we read the Court's opinion, it merely looks to the evidence alone and makes some general observations about the sufficiency thereof, but without setting forth that evidence, and without showing how the inference the Court draws from the evidence could have been a proximate cause, as this Court has so helpfully done in prior cases. Respondent believes this should be done.

III.

The majority opinion says "The proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury", and that the general finding of unsafe place "has support in the testimony of witnesses justifying the inference that the passageway as used was not a safe place for the petitioner to work while performing his assigned duties". But what are the "proofs", and where is the "testimony", or other evidence, justifying such an inference, other than the presence and movement of the truck, from responsibility for which presence and movement the Respondent was completely absolved by the jury? Respondent cannot find either in this record, and it is assuming that it is still entitled to limit the inquiry and search to what is shown by, and inferable from, this record. It cannot be inferred that the footing was bad, or that the weather was inclement, or that visibility was limited, because the record affirmatively shows to the contrary. It cannot be inferred that there was any negligent conduct on the part of any other fellow employee, constributing to Petioner's injury, because the record is completely silent as to any such fact or circumstance.

But assuming, argumentatively, that there were such "proofs", or such allowable "inferences", where is the causal relation between such proofs and inferences and Petitioner's injury, when it was the truck, and the truck alone, that injured Petitioner? There is no dispute about the cause, and the only cause, of the injury. That proof was made primarily by Petitioner, but it is also fairly supported by every other witness in the case. No inference can be drawn from this record that anything other than the truck caused, "in whole or in part", Petitioner's injury.

It appears to Respondent that it has been cast in this action upon "proofs" which have not been pointed out, which Respondent cannot find, and which Respondent believes cannot be found, and which "proofs", if extant, are affirmatively shown by the record to have had no causal relation to Petitioner's injury.

Since writ has been granted and the case has been heard on its merits, Respondent believes that the case justifies a recital of the facts from which an inference of negligence could be drawn upon this record from any fact or circumstance other than the presence and movement of the truck, for which Respondent has been absolved, and an exposition should be made disclosing any conceivable causal connection between such inferred negligence, if any, and Petitioner's injury. Respondent earnestly believes that any such effort on the part of this Court would surely result in a withdrawal of the present opinion and judgment, and the entering of judgment affirming the judgment of the Court of Civil Appeals. *Herdman vs. Pennsylvania R. Co.*, 352 U. S. 518 (1957).

IV.

What implications are to be drawn from the Court's opinion regarding Texas trial and appellate Rules of Practice in F.E.L.A. cases? May not a Texas Court, in a F.E.L.A. case, as in all other cases, follow its Rules of Practice on issue submission, which are consonant with the Federal Rules; which seek only to limit the jury to its true historic function of finding the facts; and which Rules it applies without fear or favor to plaintiff and defendant alike? A defendant sought the general submission, where specific submissions had been made, in a F.E.L.A. case,

but the Supreme Court of Texas, speaking through its Chief Justice for a unanimous court, said:

> "But a defendant is not entitled to a general submission of contributory negligence when the only issue of contributory negligence raised by the evidence has been submitted specially, as in this case". (*Texas & N. O. R. Co. vs. Hayes*, 293 S.W. 2d, 484 (1956).)

The rule ought to work both ways.

What guidance does the majority opinion of this Court give to the trial courts of Texas?

And wherein did the Court of Civil Appeals err? May it not construe a jury verdict? Did it not follow the universally recognized correct rules of construction? Did it not apply them correctly, and in harmony with the application which was made by this Court in *Pardee vs. Aldridge*, 189 U. S. 429, and *New Orleans Insurance Association vs. Piaggio*, 83 U. S. 378? What guidance does the majority opinion of the Court gives the Court of Civil Appeals in subsequent cases?

CONCLUSION

Believing that the Texas Courts have in no wise departed from the principles announced by this Court prior to judgment and opinion herein; that this Court's Opinion does not expound any error in the judgment and opinion of the Court of Civil Appeals; and that the judgment of that Court is correct; Respondent respectfully asks that a rehearing be granted, that the judgment of the Court of

Civil Appeals be affirmed, and, alternatively, that, at least a clarifying opinion be written which would give guidance to the lower courts on these points:

1. Did either Texas Court depart from the principles theretofore announced by this Court?

2. May a Texas trial court follow its Rules of Practice, and if not, what shall it do?

3. Is there any evidence of "unsafe place" other than the presence and movement of the truck?, and if so,

(a) Of what does it consist?

(b) How did it cause, "in whole or in part", Petitioners' injury?

4. May not a Texas Appellate Court construe a jury verdict in a F.E.L.A. case, and if so, wherein did the Court of Civil Appeals err?

Respectfully submitted,

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Galveston, Texas

CERTIFICATE

I, CHARLES L. COBB, one of counsel of record for Respondent and a member of the Bar of this Honorable Court, do hereby certify that the foregoing Motion for Rehearing is presented in good faith and not for delay, to certify which, witness my hand this 3rd day of June, 1957.

Charles L. Cobb

CHARLES L. COBB
Counsel of Record for Respondent

CERTIFICATE OF SERVICE

I, CHARLES L. COBB, one of the attorneys for Respondent, PANHANDLE & SANTA FE RAILWAY COMPANY, and a member of the Bar of the Supreme Court of the United States, do hereby certify that Petitioner, H. T. ARNOLD, was served with copies of Respondent's Motion for Rehearing in accordance with Rule 58 by depositing copies of such Motion in the United States Post Office at Lubbock, Texas, first-class, postage prepaid, addressed to counsel of record for Petitioner, HENRY D. AKIN, JR., 505 North Ervay, Dallas 1, Texas, and J. O. BEAN, Tenth Floor, Gulf States Building, Dallas, Texas, sending two copies of such Motion to each of them, on the 3rd day of June, 1957, in accordance with Section 1 and 3(b) of Rule 33 of the Revised Rules of the Supreme Court of the United States.

Charles L. Cobb

CHARLES L. COBB
Counsel of Record for Respondent